Nos. 01-950 and 01-1018

In the Supreme Court of the United States

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS, PETITIONERS

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

PONDEROSA DAIRY, ET AL., PETITIONERS

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BARBARA MCDOWELL
Assistant to the Solicitor General

MARK B. STERN
ARA B. GERSHENGORN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 7 U.S.C. 7254 exempts California's milk pricing and pooling regulations from scrutiny under the Commerce Clause.

2. Whether California's milk pricing and pooling regulations violate the Privileges and Immunities Clause.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	8
I. The court of appeals' holding that Congress exempted California's milk pricing and pooling plan from the Commerce Clause, although erroneous, does not warrant this Court's review	9
II. The court of appeals' holding that California's milk pricing and pooling plan does not violate the Privileges and Immunities Clause does not warrant this Court's review	19
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Baldwin v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)	16
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984)	3
C&A Carbone, Inc. v. *Town of Clarkstown*, 511 U.S. 383 (1994)	17
Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564 (1997)	18
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	11
General Motors Corp. v. *Tracy*, 519 U.S. 278 (1997)	18
H.P. Hood & Sons v. *Du Mond*, 336 U.S. 525 (1949)	16
Maine v. *Taylor*, 477 U.S. 131 (1986)	10
Polar Ice Cream & Creamery Co. v. *Andrews*, 375 U.S. 361 (1964)	16
Shamrock Farms Co. v. *Veneman*, 146 F.3d 1177 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999)	7, 8, 12, 13, 15, 17
South-Central Timber Dev., Inc. v. *Wunnicke*, 467 U.S. 82 (1984)	10, 15, 17

Cases—continued: Page

Tolchin v. *Supreme Court*, 111 F.3d 1099 (3d Cir.), cert. denied, 522 U.S. 997 (1997) 20
Trinova Corp. v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991) 18
West Lynn Creamery, Inc. v. *Healy*, 512 U.S. 186 (1994) 3, 16
Wyoming v. *Oklahoma*, 502 U.S. 437 (1992) 10
Zuber v. *Allen*, 396 U.S. 168 (1969) 2

Constitution, statutes, regulations and rule:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) ..... *passim*
Art. IV, § 3, Cl. 2 (Privileges and Immunities Clause) 7, 8, 9, 19, 20
Agricultural Adjustment Act, ch. 25, 48 Stat. 31 2
Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* 2
7 U.S.C. 602(1) 2
Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (7 U.S.C. 7201 *et seq.*) 6
7 U.S.C. 7253 6
7 U.S.C. 7253(a)(2) 6, 12
7 U.S.C. 7254 ..... *passim*
7 U.S.C. 7254(1) 11
7 U.S.C. 7254(2) 11
Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-533, 104 Stat. 2362 13
21 U.S.C. 343-1(a) 13
Cal. Food & Agric. Code (West 2001):
§ 35784 ..... 6, 12
§§ 61932-61935 3
§§ 62061 *et seq.* 12
§§ 62700 *et seq.* 12
§ 62707 4

Regulations and rule—Continued: Page

7 C.F.R. Pts. 1000-1199 3
Sup. Ct. R. 10 17

Miscellaneous:

California Dep't of Food & Agriculture: *California Dairy Information Bulletin*:
Feb. 1999 19
Oct. 2002 <http://www.cdfa.ca.gov> 19
Welcome to California Dairy Programs (visited Sept. 16, 2002) <http://www.cdfa.ca.gov/dairy> 13
Formulation of the 1995 Farm Bill (Dairy Title): Hearings Before the Subcomm. on Dairy, Livestock, and Poultry of the House Comm. on Agric., 104th Cong., 1st Sess. (1995) 13-14, 15
H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. (1996) 14
Milk Pooling Branch, California Dept. of Food & Agriculture, *Pooling Plan for Market Milk As Amended* (Sept. 1, 2001) <http://www.cdfa.ca.gov> 4, 5, 6

In the Supreme Court of the United States

No. 01-950

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS, PETITIONERS

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

No. 01-1018

PONDEROSA DAIRY, ET AL., PETITIONERS

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order of April 15, 2002, inviting the Solicitor General to express the views of the United States.

STATEMENT

The principal question in this case is whether 7 U.S.C. 7254, which saves from preemption certain California laws regarding the composition and labeling of "fluid" (*i.e.*, processed) milk, exempts the State's entire program regulating the market in "raw" (*i.e.*, unprocessed) milk from Commerce Clause scrutiny. As explained below, the United States has concluded that, although the court of appeals erred in

holding that Section 7254 furnishes such an exemption, its holding does not warrant review at this time.

1. The question of the proper interpretation of Section 7254 in this case arises against the backdrop of the complex regulatory regime governing regional markets in raw milk. In the 1930s, Congress enacted a series of statutes, including the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, to regulate the marketing of milk and other dairy products. The need to regulate milk marketing derives from two distinct phenomena: (1) a pricing structure that permits different returns for raw milk of the same quality depending upon its end use (*e.g.*, as fluid milk, as powdered milk, or as an ingredient in products such as butter and cheese), and (2) a cyclical production process with fairly stable demand, which requires farmers to maintain sufficiently large herds to meet the demand for fluid milk even in periods of lean production. *Zuber* v. *Allen*, 396 U.S. 168, 172-173 (1969). Those two features led to "utter chaos" when the market was unregulated. *Id.* at 174. In an effort to "restore order to the market and boost the purchasing power of farmers," *ibid.*, Congress enacted the Agricultural Adjustment Act, ch. 25, 48 Stat. 31, which later formed the basis for the AMAA.

The AMAA authorizes the Secretary of Agriculture to "establish and maintain such orderly marketing conditions * * * as will establish, as the price to farmers, parity prices." 7 U.S.C. 602(1). It accordingly empowers the Secretary to issue "marketing orders" that regulate minimum prices that dairy farmers may receive in a defined geographic area. The orders classify milk according to its end use, establish a minimum price for each class of milk, and require regulated distributors to account to a regional pool for each class of milk that they purchase. The regional pools assure dairy farmers a uniform "blend price" for each unit of milk sold, based on a weighted average value of all milk sold

within the marketing area. See *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 189 n.1 (1994); *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 342-343 (1984).

2. Not every geographic area in the United States is covered by a federal marketing order. See 7 C.F.R. Pts. 1000-1199; *Block*, 467 U.S. at 342. The California dairy industry has never participated in such an order. Instead, the State has adopted its own regulatory program to stabilize the market for raw milk. California dairy farmers are guaranteed a uniform minimum return for their raw milk, regardless of the end use to which the raw milk is to be put by a processor (handler). At the same time, California handlers are required to make different total outlays for raw milk depending on its end use, which reflects the higher value of raw milk used to produce fluid milk over raw milk used to produce other products. A pooling mechanism among handlers reconciles the varying amounts that handlers pay for raw milk with the uniform amounts that California dairy farmers receive for raw milk.

a. To accomplish those regulatory goals, California assigns raw milk to one of five classes depending on its end use. Cal. Food & Agric. Code §§ 61932-61935 (West 2001). Class 1, which consists of raw milk used to produce fluid milk products, typically demands the highest price. Other classes, such as raw milk used to produce butter (Class 4a) and cheese (Class 4b), typically demand lower prices. The California Department of Food and Agriculture (CDFA) establishes a minimum price for each component of raw milk (butterfat, solids-not-fat, and fluid carrier) depending on the class of product into which the raw milk is to be manufactured. A handler that purchases raw milk from a California dairy farmer for processing into fluid milk is obligated to pay the Class 1 price, while a handler that purchases raw milk from a California dairy farmer for processing into cheese is obligated to pay the Class 4b price.

The price that a handler pays for raw milk—which, as explained above, is based on its end use—does not equal the price that a dairy farmer receives for raw milk. All California dairy farmers are guaranteed a uniform minimum price for their raw milk regardless of the how the milk is used by the handler that buys it. Otherwise, dairy farmers would have an incentive to compete to sell their raw milk to handlers that produce fluid milk, because those handlers would pay more for raw milk than would handlers that produce other dairy products. Such competition was thought to result in the inefficient movement of milk around the State. See 01-950 Pet. App. A3, A14 n.3 (Pet. App.).

The uniform minimum price guaranteed to California dairy farmers is a blend price, which CDFA computes based on a weighted average of all raw milk purchases in the State. It thus falls somewhere between the Class 1 price and the Class 4b price. See Pet. App. A3. In fact, CDFA computes two such blend prices—the "quota" price and the "overbase" price. See Milk Pooling Branch, CDFA, *Pooling Plan for Market Milk As Amended* §§ 902-904 (Sept. 1, 2001) <http://www.cdfa.ca.gov> *(Pooling Plan)*. The quota price, which is the higher of the two, is paid for an amount of production that was originally determined for California dairy farmers based on their respective shares of the fluid milk market in the 1960s and that has been subject to certain adjustments in subsequent years. See Cal. Food & Agric. Code § 62707 (West 2001). The "overbase" price is paid for a California dairy farmer's milk in excess of any quota.[1]

The pooling mechanism among handlers, which results in a transfer of funds from handlers of raw milk for higher-priced

[1] California dairy farmers may buy and sell quota. See Pet. App. A4. Out-of-state dairy farmers are not permitted to own quota, because quota is available only to a "[p]roducer," which is defined as "any person that produces market milk in the State of California from five or more cows." *Pooling Plan* § 104 (Pet. App. A79).

uses (*e.g.*, fluid milk) to handlers of raw milk for lower-priced uses (*e.g.*, butter and cheese), reconciles the uniform price received by California dairy farmers with the different prices paid by handlers depending upon the uses that they make of raw milk. In order to determine each handler's obligation to the pool, CDFA calculates an "in-plant blend price" for each handler, which is based on the particular use or uses that the handler makes of the raw milk that it purchases. See *Pooling Plan* Art. 9 (The "in-plant" blend price must be distinguished from the "quota" and "overbase" blend prices, which are uniform prices paid to California dairy farmers and are based on usage of raw milk by *all* handlers, rather than by a single handler.). The handler's in-plant blend price is then multiplied by the total amount of raw milk that the handler has purchased to determine the handler's "gross pool obligation." The handler must account to the pool based on that amount, subject to certain adjustments. If the total amount of a handler's payments to dairy farmers is less than its pool obligation (as is typically the case for handlers that primarily produce Class 1 fluid milk, because their in-plant blend price exceeds the "quota" and "overbase" prices guaranteed to dairy farmers), the handler pays the difference into the pool. *Id.* § 1003. If the total amount of a handler's payments to dairy farmers exceeds its pool obligation (as is typically the case for handlers that primarily produce butter or cheese, because their in-plant blend price is lower than the "quota" and "overbase" prices), the handler draws on the pool to recover the difference. *Id.* § 1004; see Pet. App. A3-A5.

b. Before the 1997 amendments to the California plan, if a handler bought milk from an out-of-state dairy farmer, the handler received a credit against its pool obligation based on its in-plant blend price. Pet. App. A17. As a consequence, although a handler that principally produced fluid milk had to pay money into the pool for its raw milk purchases from

California dairy farmers, it did not have to pay money into the pool for its purchases from out-of-state farmers.

In 1997, the plan was amended so that the credit that a handler receives for out-of-state milk purchases is equal to the lower of the handler's in-plant blend price or the quota price. See *Pooling Plan* § 900(d); Pet. App. A4-A5. For a handler that principally produces fluid milk, the quota price is lower than its in-plant blend price. As a result, a handler that purchases raw milk from out-of-state dairy farmers to be processed into fluid milk typically must contribute some additional amount to the pool for those purchases. The 1997 amendment thus reduced an incentive that previously existed for handlers that produce fluid milk to purchase raw milk from dairy farmers outside California. At the same time, however, out-of-state dairy farmers, unlike California dairy farmers, are not guaranteed any minimum price for their raw milk (much less the quota price).

c. California also sets composition standards for fluid milk sold in the State. Those standards, which exceed the standards set by the federal Food and Drug Administration, establish minimum levels of solids-not-fat and butterfat. See Cal. Food & Agric. Code § 35784 (West. 2001). California handlers standardize their fluid milk by adding a fortifying agent, and they are provided with a fortification allowance that reduces the cost of doing so. *Pooling Plan* § 803(k). Out-of-state handlers are not eligible to receive that fortification allowance. See Pet. App. A25-A26.

3. In the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888, Congress required the consolidation and reformation of federal milk marketing orders. See 7 U.S.C. 7253. Congress authorized the Secretary of Agriculture, "[u]pon the petition and approval of California dairy producers," to "designate the State of California as a separate Federal milk marketing order." 7 U.S.C. 7253(a)(2).

In addition, Congress included in the FAIR Act the provision at issue in this case, 7 U.S.C. 7254, which states:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding—
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

4. In consolidated actions, petitioners, who operate dairy farms in Nevada and Arizona, challenged the constitutionality of the 1997 amendments to the California pooling plan. They contended that the pooling plan discriminates against out-of-state dairy farmers in violation of the Commerce Clause and the Privileges and Immunities Clause.

a. The district court rejected those claims. Pet. App. A13, A16-A22. The court granted summary judgment for the State respondents on the Commerce Clause claim. The court relied on *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999), which the court understood as holding that 7 U.S.C. 7254 "immunized California's milk pricing and pooling laws from Commerce Clause challenge." Pet. App. A19. The court dismissed petitioners' claim under the Privileges and Immunities Clause on the ground that the pooling plan does not discriminate based on out-of-state residency or citizenship. *Id.* at A13.

b. The United States Court of Appeals for the Ninth Circuit affirmed. Pet. App. A1-A15.

The court of appeals, like the district court, held that *Shamrock* controlled the Commerce Clause claim. Although *Shamrock* had addressed California's fortification require-

ment for fluid milk and its fortification allowance for in-state handlers, not its pricing and pooling requirements for raw milk, the court held that "*Shamrock* broadly refers to the pricing and pooling laws and finds them to be closely related to California's composition requirements and protected from Commerce Clause challenges." Pet. App. A7-A8. The court further held that the legislative history of 7 U.S.C. 7254 "demonstrate[s] that California's pricing and pooling laws were considered to be an important element of California's milk regulatory scheme and necessary to maintain the 'standards of content and purity' for milk." Pet. App. A8 (quoting *Shamrock*, 146 F.3d at 1182). The court thus concluded that California's raw milk and fluid milk regulations are "closely related" and that it "follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk." *Id.* at A10.

The court of appeals also affirmed the district court's dismissal of petitioners' claim under the Privileges and Immunities Clause. The court noted that the corporate petitioners could not state such a claim, because that Clause does not protect corporations. Pet. App. A13. The court held that the individual petitioners' claim failed because "the classifications the pooling plan amendments create are based on the location where milk is produced," not on "any individual's residency or citizenship." *Id.* at A14.

DISCUSSION

The court of appeals held that 7 U.S.C. 7254 exempts all of California's milk pricing and pooling regulations from the limitations imposed by the Commerce Clause. That conclusion is incorrect. This Court has repeatedly instructed that such exemptions must be unmistakably clear. There is no indication at all in the text or legislative history of Section 7254 that Congress intended to immunize any of California's milk regulations from challenge under the Commerce Clause. Moreover, even if its reference to "any other provision of law" were understood to encompass the Commerce Clause, Section 7254 would provide an immunity only for the State's regulations governing the composition and labeling of fluid milk, not for its separate regulations governing the pricing and pooling of raw milk.

The court of appeals' interpretation of Section 7254, although erroneous, does not, on balance, require the Court's review at this time. The decision may be viewed as involving the misapplication of the well-established legal standard governing Commerce Clause exemptions to the particular statute claimed to create such an exemption in this case. This Court ordinarily does not grant certiorari to correct a mistaken application of settled law or an erroneous interpretation of a federal statute by a single court of appeals. Moreover, because Section 7254 applies only to California "law[s], regulation[s], or requirement[s]," no inter-circuit conflict with respect to its interpretation or application is likely to arise. Although petitioners predict that the court of appeals' decision will have a significant adverse impact on federal milk marketing programs and the dairy industry nationally, the United States Department of Agriculture has not detected any such impact to date.

The question presented by petitioners in No. 01-1018 under the Privileges and Immunities Clause also does not require the Court's review. The court of appeals' rejection of the Privileges and Immunities claim turns on its understanding of the unique provisions of state law at issue here.

I. THE COURT OF APPEALS' HOLDING THAT CONGRESS EXEMPTED CALIFORNIA'S MILK PRICING AND POOLING PLAN FROM THE COMMERCE CLAUSE, ALTHOUGH ERRONEOUS, DOES NOT WARRANT THIS COURT'S REVIEW

1. Although the Commerce Clause "limits the power of the States to erect barriers against interstate trade," "Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine* v. *Taylor*, 477 U.S. 131, 137, 138 (1986). The Court has held, however, that Congress must make any Commerce Clause exemption "unmistakably clear," so as to assure that "all segments of the country are represented" in a decision to allow one State to affect persons or operations in other States. *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91, 92 (1984); accord, *e.g.*, *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992); *Taylor*, 477 U.S. at 139.

Section 7254 does not contain any indication at all, much less an "unmistakably clear" one, that Congress intended to immunize California's milk pricing and pooling laws from Commerce Clause scrutiny. The statutory text does not include any reference either to the Commerce Clause or to California's pricing and pooling laws for raw milk. Nor does the legislative history provide any indication that Congress intended Section 7254 to immunize those laws from scrutiny under the Commerce Clause.

First, Section 7254 states that "[n]othing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California" to enact or enforce certain of its own laws. The statutory text does not unambiguously indicate that Congress intended to exempt *any* of California's laws from the Commerce Clause. Section 7254 does not refer to the Commerce Clause specifically or to the Constitution more generally. Moreover, its directive that no provision of law

"shall be construed" in a particular manner is more naturally read as referring only to non-constitutional sources of law, because Congress is not ordinarily assumed to have intended to constrain the Judiciary's authority to construe the Constitution. Cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997). Nor is there any reason to suppose that Congress intended to authorize California, and only California, to erect barriers to interstate commerce that would otherwise be forbidden by the Commerce Clause. Section 7254 thus is best understood as protecting certain California laws against preemption only by "this Act" (*i.e.*, the FAIR Act) and any other provisions of federal statutory or regulatory law.

Second, Section 7254, even if understood to provide a Commerce Clause immunity for some state laws, does not reach the laws at issue here. Section 7254, by its terms, applies only to laws regarding "the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California" and "the labeling of such fluid milk products with regard to milk solids or solids not fat."[2] 7 U.S.C. 7254(1) and (2). California's pricing and pooling laws do not regulate either fluid milk content or fluid milk labeling. They are thus outside the scope of whatever Commerce Clause exemption Section 7254 arguably provides.[2]

Congress's decision to confine Section 7254 to a subset of California's milk marketing laws appears to have been quite deliberate. Other provisions of the FAIR Act, of which Section 7254 was a part, demonstrate that, when Congress wanted to refer to California's milk pricing and pooling laws, Congress did so expressly. For example, in the immediately

---

[2] As noted above (at 4), CDFA establishes minimum prices that handlers must pay for various components of raw milk—butterfat, solids-not-fat, and fluid carrier. Even if a regulation that provides for setting a price for the "milk solids" or "solids-not-fat" component of milk could be viewed as a regulation "regarding * * * the percentage of milk solids or solids not fat" in milk, Section 7254 refers to the percentage of those components in "fluid milk," not raw milk.

preceding section of the FAIR Act, Congress authorized the Secretary of Agriculture, "[u]pon the petition and approval of California dairy producers," to "designate the State of California as a separate Federal milk marketing order." 7 U.S.C. 7253(a)(2). Congress further provided that any such "order covering California shall have the right to reblend and distribute order receipts to recognize quota value," *ibid.*, thus referring specifically to the aspect of California's pricing and pooling laws that guarantees state dairy farmers with "quota" a higher blend price for their raw milk. Presumably, if Congress had wanted Section 7254 to encompass California's pricing and pooling laws, Congress would have referred to those laws with similar specificity.

The court of appeals acknowledged in its predecessor *Shamrock* case that Section 7254 "does not specifically refer to these [pricing and pooling] laws, as it does to the milk composition standards." 146 F.3d at 1182 (Pet. App. A34). In both this case and *Shamrock*, however, the court concluded that Section 7254 encompasses the pricing and pooling laws as well, reasoning that those laws and the composition and labeling laws are "interrelated and mutually interdependent." Pet. App. A7 (quoting *Shamrock*, 146 F.3d at 1182). The court was mistaken. Even if Congress's express exemption of one state law from the Commerce Clause were understood to extend to "interrelated and mutually interdependent" state laws, no such relationship exists between the composition and labeling laws expressly referred to in Section 7254 and the pricing and pooling laws at issue here.

The pricing and pooling laws are not part of the same regulatory program as the composition and labeling laws. The programs are authorized under different divisions of the California Food and Agriculture Code. Compare Cal. Food & Agric. Code § 35784 (West 2001) (composition standards), with *id.* §§ 62061 *et seq.* (minimum prices), and *id.* §§ 62700 *et seq.* (equalization pools). The programs were implemented

at different times. And they are administered by different components of the CDFA. See CDFA, *Welcome to California Dairy Programs* (visited Sept. 16, 2002) <http://www.cdfa.ca.gov/dairy> (noting that the milk composition laws are administered by the Milk and Dairy Foods Control Branch, while the milk pricing and pooling laws are administered by the Dairy Marketing Branch and the Milk Pooling Branch). It would be particularly unwarranted in such circumstances to construe Congress's express reference to California's composition and labeling laws for fluid milk as also encompassing California's pricing and pooling laws for raw milk.

Third, the context in which Section 7254 was enacted supports the conclusion that it was intended solely to protect California's fluid milk composition and labeling laws against preemption by federal statutes and regulations. In 1990, Congress enacted the Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-533, 104 Stat. 2362, which prohibits States from setting standards of identity for a food that are different from the standards set by the FDA. See 21 U.S.C. 343-1(a). In response, out-of-state dairy farmers, who had previously complied with the California composition and labeling standards when marketing milk in the State, sought a judicial determination that the NLEA preempted the California standards. The State, in turn, petitioned the FDA for an exemption from the NLEA for its milk composition and labeling standards. See *Shamrock*, 146 F.3d at 1180 (Pet. App. A28).

At the congressional hearings on what was to become the FAIR Act, witnesses asked Congress specifically to exempt the California milk composition and labeling standards from preemption by the NLEA or other federal statutes. For example, Representative Thomas, the only Member of Congress to address the California milk regulations, urged that those standards be protected against preemption by "national nutritional labeling requirements." *Formulation of*

the 1995 Farm Bill (Dairy Title): Hearings Before the Subcomm. on Dairy, Livestock, and Poultry of the House Comm. on Agric., 104th Cong., 1st Sess. 435 (1995) (*House Hearings*). He did not urge that any of California's other milk regulations, including those involving the pricing and pooling of raw milk, be protected against federal statutory (or constitutional) challenge. Other witnesses similarly focused on the need to assure that California could continue to enforce its fluid milk composition standards.[3]

The Conference Report on the FAIR Act confirms that Section 7254 was directed only at the particular problem identified at the congressional hearings. See H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 338 (1996). The Conference Report explains that Section 7254 "provides the State of California an exemption from the preemption provisions of any Federal law respecting standards of identity and labeling for fluid milk," so that California may "fully enforce and apply its fluid milk standards and their attendant labeling requirements to all fluid milk sold at retail or marketed in the State." *Id.* at 338-339.

The court of appeals, in adopting its more expansive interpretation of Section 7254, did not discuss the Conference Report, which is usually the most authoritative legislative history of an Act of Congress. The court nonetheless purported to find "ample support" in the legislative history —specifically, the testimony of two witnesses at the congressional hearings—for the proposition that "Congress intended that the milk pricing and pooling scheme be included in the exemption." *Shamrock*, 146 F.3d at 1182 (Pet. App. A34); accord Pet. App. A8. Ordinarily, the testimony of two witnesses, only one of whom is a Member of

[3] See, *e.g.*, *House Hearings* 517-518 (prepared statement of A. J. Yates, Deputy Secretary, CDFA); *id.* at 547-548 (prepared statement of James E. Tillison, Alliance of Western Milk Producers); *id.* at 568 (prepared statement of Craig S. Alexander, Dairy Institute of California).

Congress, is an uncertain indication of what Congress as a whole intended. Here, moreover, the witnesses' testimony does not support the court's interpretation of Section 7254.

For example, Representative Thomas did not, as the court of appeals perceived, "explain[] that the success of California's milk standards is attributable to the state's pricing system." *Shamrock*, 146 F.3d at 1182 (Pet. App. A34). Instead, he stated that the success of the California dairy industry was attributable both to the State's "standards for fluid milk products which ensure a high quality product" and to the State's "pricing system for dairy products." *House Hearings* 435. He did not suggest that the composition regulations and the pricing regulations were dependent on each other for their effectiveness. Moreover, even if Representative Thomas had made the statement that the court attributed to him, the statement still would say nothing about any Commerce Clause exemption for the pricing and pooling laws.[4]

In sum, Section 7254 provides no indication that Congress intended to exempt California's pricing and pooling laws from the Commerce Clause, much less the "unmistakably clear" indication that this Court's decisions require. *South-Central Timber*, 467 U.S. at 91. The court of appeals erred in concluding otherwise.

2. The court of appeals' error with regard to the scope of Section 7254 cannot confidently be regarded as harmless. Although the United States does not take a position on the underlying constitutional question in this case, the California milk pricing and pooling laws, at a minimum, raise substan-

[4] Similarly, Craig S. Alexander of the Dairy Institute of California discussed the State's milk composition regulations separately from other aspects of its milk marketing program. See *House Hearings* 480-482. He urged "[f]ederal legislation * * * to preserve California's standards" for the composition of fluid milk products, *id.* at 482, but did not urge legislation to protect the pricing and pooling laws against a federal constitutional challenge.

tial questions under the Commerce Clause because of their facially disparate treatment of California dairy farmers and dairy farmers located outside the State.

The Commerce Clause prohibits States from engaging in "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery*, 512 U.S. at 192. On several occasions, the Court has held that state milk marketing regulations ran afoul of that prohibition. See, *e.g.*, *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 375-379 (1964); *H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525 (1949); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Most recently, in *West Lynn Creamery*, the Court struck down a Massachusetts regulation that required milk handlers to pay an assessment on all milk that they sold to retailers, whether the handlers purchased the milk from in-state or out-of-state dairy farmers, although the entire assessment was distributed to in-state dairy farmers. The Court assumed that "[a] pure subsidy [for Massachusetts dairy farmers] funded out of general revenue" would not violate the Commerce Clause. 512 U.S. at 199. The court held, however, that the Massachusetts regulation violated the Commerce Clause, because the subsidy went exclusively to Massachusetts dairy farmers, yet was "funded principally from taxes on the sale of milk produced in other States." *Ibid.*

The California pricing and pooling laws at issue here may raise somewhat similar concerns under the Commerce Clause. For example, a California handler that purchases raw milk for processing into fluid milk typically must account to the equalization pool for the difference between the quota or overbase price (*i.e.*, the two blend prices that California dairy farmers are guaranteed for their milk) and the ordinarily higher Class 1 price. In effect, therefore, that handler writes two checks for each milk purchase—one to the dairy

farmer that produced the milk and one to the pool. After the 1997 amendments, the handler must do so whether the milk came from a California dairy farmer or an out-of-state dairy farmer. The funds in the pool are then distributed to handlers of other classes of milk—those priced below the quota and overbase blend prices—to compensate them for paying those prices to California dairy farmers. Thus, the equalization payments are provided to handlers exclusively with respect to milk purchases from California dairy farmers, but are collected from handlers with respect to milk purchases from both California and out-of-state dairy farmers.

The lower courts did not address the merits of petitioners' Commerce Clause challenge to the California pricing and pooling laws, having concluded that such a challenge was foreclosed by Section 7254. The constitutionality of those laws under the Commerce Clause is thus not among the Questions Presented in the petitions. In such circumstances, if the Court were to grant certiorari and reverse on the Section 7254 question, it would be appropriate to remand the underlying Commerce Clause question for consideration by the lower courts in the first instance.

3. It is a close question whether the court of appeals' erroneous holding with respect to the scope of Section 7254 warrants this Court's review. The Court ordinarily does not grant certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The court of appeals correctly identified the rule that Congress must make "unmistakably clear" any intent to exempt a state law from the Commerce Clause. *Shamrock*, 146 F.3d at 1180 (quoting *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring), and *South-Central Timber*, 467 U.S. at 91) (Pet. App. A30). Its error was in misapplying that rule here.

Petitioners do not identify any conflict among the circuits with respect to the standard for determining whether Con-

gress has exempted a state law from the Commerce Clause. Nor is any circuit conflict likely to arise with respect to the application of that standard to Section 7254, which concerns only California's "law[s], regulation[s], or requirement[s]," and not those of any other State. Neither the federal milk marketing orders promulgated under the AMAA nor the milk marketing regulations of any other State contain provisions similar to those at issue here.

To be sure, this Court has considered Commerce Clause challenges to state regulations in the absence of an asserted conflict among the federal or state appellate courts. See, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997); *General Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997); *Trinova Corp.* v. *Michigan Dep't of Treasury*, 98 U.S. 358 (1991). The petitions in those cases, howe , presented a constitutional question of at least potential nificance in other States, whereas the petitions in this ca present a question concerning the construction of a fede l statute that applies only to California milk regulations.

At the same time, it is relevant to the appropriateness of review that the court of appeals clearly erred in its construction of Section 7254 and that the result of its error is to shield from Commerce Clause scrutiny not only the 1997 amendments to California's pricing and pooling plan, but also any revisions to the plan that California may make in the future. Indeed, petitioners assert (01-950 Pet. 13) that the court of appeals' decision "has the potential for a significant impact on the future course" of federal milk programs. The United States Department of Agriculture, however, has not detected any such impact to date. The decision has no direct effect on the regulation of milk under the federal milk marketing orders. At least to this point, the Department has not found that the operation of the California milk pricing and pooling plan, as amended in 1997, has resulted in the uneconomic movement of milk on a regional or national basis, or

has had other adverse effects on the federal program that the Department administers.[5] If in the future the decision proves to have the adverse consequences that petitioners predict, perhaps as a result of further amendments to California's pricing and pooling plan, this Court could grant review in another case at that time. Alternatively, Congress could exercise its power under the Commerce Clause to address those consequences.

On balance, therefore, the United States does not belie that the court of appeals' interpretation of Section 7254, although erroneous, warrants the Court's review at this time. If, however, the Court were to conclude otherwise, this case is a suitable vehicle in which to address the scope of that provision.

II. THE COURT OF APPEALS' HOLDING THAT CALIFORNIA'S MILK PRICING AND POOLING PLAN DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE DOES NOT WARRANT THIS COURT'S REVIEW

The court of appeals' rejection of petitioner's Privileges and Immunities Clause challenge to the California pricing and pooling laws also does not warrant this Court's review. The court ruled that most of the parties could not assert a claim under that Clause, because they are corporations, not individuals. Pet. App. A13. Petitioners do not seek review of that ruling. Instead, petitioners contend that the court of

---

[5] According to statistics compiled by CDFA, out-of-state dairy farmers have continued to ship substantial quantities of raw milk into California since the 1997 amendments to the California pricing and pooling plan. In January 1997, before the amendments, approximately 64 million pounds of milk were shipped into California. In January 2001, approximately 53 million pounds were shipped into California, and in January 2002, approximately 87 million pounds were shipped into California. See CDFA, *California Dairy Information Bulletin* 10 (Oct. 2002) <http://www.cdfa.ca.gov>; CDFA, *California Dairy Information Bulletin* 10 (Feb. 1999).

appeals erred in ruling that a state law cannot violate the Clause unless it discriminates on its face based on citizenship or residency. See 01-1018 Pet. 17-23.

Petitioners misread the court of appeals' opinion. The court's reasoning did not, as petitioners suggest, turn on whether California's pricing and pooling laws discriminate on their face, rather than only in their impact. Instead, the court reasoned that the classifications created by those laws are based not on where dairy farmers reside, but on "the location where milk is produced," and do not violate the Privileges and Immunities Clause for that reason. Pet. App. A14. That holding, which turns on the interpretation of unique provisions of state law, does not present a question of general significance that merits this Court's review.[6]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
MARK B. STERN
ARA B. GERSHENGORN
Attorneys

DECEMBER 2002

---

[6] Nor does the Ninth Circuit's decision in this case "conflict," as petitioners assert (01-1018 Pet. 23), with the Third Circuit's decision in *Tolchin* v. *Supreme Court*, 111 F.3d 1099, cert. denied, 522 U.S. 977 (1997). In *Tolchin*, as here, the court of appeals held that the provision at issue did *not* discriminate on the basis of residency in violation of the Privileges and Immunities Clause. See 111 F.3d at 1113.